No. 22443

In the

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR, his wife, surviving parents of FELIX MATTHEW DORR, deceased, et al,

Appellees.

Petition for Rehearing In Banc

O'CONNOR, CAVANAGH, ANDERSON
WESTOVER, KILLINGSWORTH
& BESHEARS

By JOHN H. WESTOVER
DAVID L. HAGA
1800 First Federal Savings Building
Phoenix, Arizona 85012

Attorneys for Appellant

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

No. 22443

In the

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Appellant,

vs.

NELSON CHRISTIAN DORR and AEDA DORR, his wife, surviving parents of FELIX MATTHEW DORR, deceased, et al,

Appellees.

Petition for Rehearing
In Banc

COMES NOW Appellant, ALLSTATE INSURANCE COMPANY, an Illinois corporation, by and through its attorney undersigned, and pursuant to Rules 35 and 40 Fed. R. of App. Proc. and Rule 12 of this Court, respectfully petitions for a rehearing In Banc of this cause and requests that upon such rehearing the judgment of this Court shall be modified as follows:

(1) That this cause shall be remanded to the United States District Court for the District of Arizona with instructions to decide the issues presented therein on the merits;

(2) In the alternative, that this Court grant the petition for rehearing In Banc to clarify portions of the Opinion, and specifically to delete certain erroneous statements contained therein.

This case is suggested as one appropriate for rehearing In Banc because of the seriousness of the constitutional issue involved, since it affects a large segment of the citizens of the State of Arizona.

This petition for rehearing In Banc is based upon the following grounds:

1. Request That the Judgment of the Lower Court Be Reversed and Remand the Case to Be Decided on Its Merits.

The decision does not face the crucial issue in the case that the insurance contract, when issued, did not include the judicial pronouncement that a non-certified insurance policy would not be void *ab initio* because of fradulent misrepresentation by the applicant.

This Court, in the Opinion, has in the guise of upholding purported social and economic objectives of the Arizona Legislature ratified the Arizona Supreme Court's unconstitutional application and interpretation of an Arizona Statute which was not intended to be so applied by the Arizona Legislature. The Court quoted A.R.S. § 28-1170(F) in Footnote No. 1 of the Opinion, and relied upon the language contained therein as the cornerstone of its Opinion. However, the Court did not mention A.R.S. § 28-1170(A) which defines the term "motor vehicle liability policy" as used in A.R.S. § 28-1170(F) which the Legislature defined in Subsection (A) as:

> . . . an owner's or an operator's policy of liability insurance, certified as provided in § 28-1168 or § 28-1169 as proof of financial responsibility, and issued, except as otherwise provided in § 28-1169, by an insurance carrier duly authorized to transact business in this state to or for the benefit of the person named therein as insured.

The Legislature recognized the distinction between a certified and a non-certified policy at the time it enacted A.R.S. § 28-1170, as indicated by the express wording used in that Statute. Thereafter, the Arizona Supreme Court, in *Jenkins v. Mayflower Insurance Exchange,* 93 Ariz. 287, 380, P.2d 145 (1963), decided March 27, 1963, that the omnibus clause was a part of every motor vehicle liability policy regardless of how denominated. The *Jenkins* decision did not *per se* make all policy defenses void, as the only clause presented to the Court in that case was the omnibus provision. It was not until the case of *Sandoval v. Chenoweth,* 102 Ariz. 241, 428 P.2d 98 (1967), decided May 25, 1967, that the Arizona Supreme Court notified insurance companies doing business in Arizona that no violation of the policy would defeat or void a policy and specifically that the failure of an insured to notify the insurer of a pending suit against the insured was not grounds for avoiding liability on the policy.

During the period between the *Jenkins* decision and the *Sandoval* decision, Appellee Gutierrez filed an application for insurance with Appellant, Allstate, dated January 29, 1964. The holding of this Court in the instant case required that Allstate, at the time it issued the policy to Mrs. Gutierrez speculate and guess the meaning of an interpretation placed upon the Statute by the Arizona Supreme Court at a later date. The Supreme Court of the United States has pointed out in a number of cases that a citizen cannot be required to guess at the meaning of a Statute, and the Statute must delineate what acts are permissable and what are not, in clear and understandable terms. See *Cramp v. Board of Public Instruction,* 368 U.S. 278 (1961); *Cf., Thornhill v. State of Alabama,* 310 U.S. 88 (1940); *Winters v. New York,* 333 U.S. 507 (1948).

Federal Courts have a duty to declare a State law unconstitutional where the Statute, on its face or as applied, impinges upon constitutional rights guaranteed by the Federal Constitution. *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Farmers Ed. & Coop. Union v. Wday,* 360 U.S. 525 (1959); *Bates v. Little Rock,* 361 U.S. 516 (1960).

The general rule set forth in the Opinion of this Court that the judiciary will not invalidate a legislative act unless it is clear that such legislation is an invalid exercise of the police power of the State is well recognized. Appellant is not questioning the legislative policy of § 28-1170(F), but the judicial interpretative power under the guise of protecting members of the public by arbitrarily interfering with private business and contractual relationships, which does not tend to promote health, safety or welfare of society.

The *Mayflower* and *Sandoval* decisions, *supra,* must be recognized as public policy decisions. Thus, in *Sandoval,* the Court stated that the *Mayflower* decision, and its Opinion in the companion case of *Schecter v. Killingsworth,* 93 Ariz. 273, 380 P.2d 136 (1963):

> . . . express the *public policy* of this state in regard to *judicial implementation* of the Financial Responsibility Act. (428 P.2d at 100; Emphasis Added)

The Court, in *Mayflower* and *Sandoval,* thus gleaned from the Safety Responsibility Act a "public policy" which the Court "judicially implemented" in those decisions.

In the present case, however, this Court is not required to resort to "public policy"; nor is this Court required to "judicially implement" any Statute. All that is required is that the plain terms of A.R.S. § 20-1109 and the cases construing this Statute which were cited by Appellant in its Opening Brief be given the effect so clearly intended by the Legislature. A.R.S. § 20-1109 provides as follows:

> All statements and descriptions in any application for an insurance policy or in negotiations therefor, by or in behalf of the insured, shall be deemed the representations and not warranties. Misrepresentation, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy unless:

1. Fradulent; or
2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
3. The insurer in good faith would either not have issued the policy, or would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or otherwise.

Appellant has alleged facts which, under A.R.S. § 20-1109, entitle it to a declaration that the policy was void and never came into existence. In any event, it is submitted that Arizona and all other jurisdictions in the United States always have had, and now have, a strong public policy against fraud.

This precise question has arisen and been adjudicated in Appellant's favor in other jurisdictions. For example, in *Safeco Insurance Company of America v. Gonacha,* 142 Colo. 170, 350 P.2d 189 (1960), the Colorado Court rejected a claim that the absolute liability provision in the Colorado Financial Responsibility Law precluded the insurer from avoiding the policy for false representation as to prior cancellations. Likewise, in *Temperance Insurance Exchange v. Coburn,* 85 Id. 468, 379 P.2d 653 (1963), the Idaho Supreme Court held that:

> Under the facts of this case, we conclude that this automobile liability insurance policy was not obtained or issued under the requirements of the Idaho Motor Vehicle Safety Responsibility Act, that the terms and conditions of said policy imposed no absolute liability upon the appellant, and that, therefore, upon proof of Coburn's knowledge that the application contained false statements material to the risk when he signed said application appellant was entitled to cancel the policy. The judgment of the trial court is reversed and the cause is remanded with instructions to enter judgment for the appellant, Temperance Insurance Exchange (379 P.2d at 657)

Similarly, in *Tri-State Ins. Co. v. Ford,* 120 F.Supp. 118 (D.N. M. 1964), the Court, in construing Texas law, held:

> It is only reasonable that the Texas Act in establishing a liability between the insurer and third persons should

> restrict such liability to instances wherein a certification has been made by the insurer that the insured is in a position by virtue of insurance to financially respond in damages in the event of future accidents. *To hold in the absence of clear legislative intent that every insurer who issues a public liability policy becomes irrevocably responsible to an injured third person at the time the accident occurs would be to place an unreasonable and unconscionable burden upon the insurance company. Such a statutory construction would place a premium upon the practice of deceit and fraud by all prospective purchasers of insurance.* (120 F.Supp. at 126; Emphasis Added)

This Court, in construing the Oregon Financial Responsibility Law, observed that:

> This statute provides that liability of the insurer becomes absolute at the time of an accident and that he cannot thereafter avoid the policy on the ground of fraud of the insured. O.R.S. 486.551. Such liability, however, is specifically limited in operation to policies issued under the financial responsibility law.
>
> (*Mayflower Insurance Exchange v. Gilmont,* 280 F.2d 12 (1960), at p. 15)

See also *Buzzone v. Hartford Accident and Indemnity Co.,* 23 N.J. 447, 129 A.2d 561 (1957). In *Buzzone,* where New York law was applied, the license of a New York driver had been suspended pending proof of his financial responsibility. Using an assumed name, the driver had obtained a policy from Hartford. In holding that Hartford could avoid the policy because of the fraud of the insured, the New Jersey Supreme Court stated that the New York Financial Responsibility Act:

> . . . is designed to subject insurers to absolute liability only where they are aware of the status of the applicant as a member of the statutory class. (129 A.2d at 565)

The New Jersey Superior Court, App.Div. in *Buzzone* (41 N.J. Super. 511, 125 A.2d 551) applied New York law. A New York Court had previously construed the New York Financial Responsibility Act as follows:

> It differentiates between car owners who have shown themselves to be irresponsible, and those who have not. It declares that when those who carry liability policies through legal compulsion cause damage in automobile operation, their insurance carriers are absolutely liable for the resulting loss; but it lays down no such rule in the case of an automobile owner voluntarily carrying such a policy, whose responsibility has never been questioned. *The construction contended for by plaintiff would encourage fraud and deceit, and would create a legal relationship so unfair and unreasonable as to be unconscionable.* Cohen v. Metropolitan Casualty Ins. Co., 233 App.Div. 340, 252 N.Y. Supp. 841 (1931). (Emphasis Supplied) (125 A.2d at 556)

With reference to the last sentence from the above-quoted passage from *Cohen,* the New Jersey Court in *Buzzone* observed:

> The essence of the fraud, deceit and imposition to which the court referred lies in subjecting to the statutory liability an insurer who did not intend to assume it, and is the same whether the insured is within or beyond the mentioned category.
>
> * * *
>
> To state it affirmatively, the sweeping statement that the insurer should be protected against fraud, deceit and imposition shows an intention to hold the insurer under the act only where it certifies the policy to the Commissioner and thus evidences its awareness of and its willingness to assume the statutory obligation as to the specific policy. (125 A.2d at 557)

It should be noted that in matters relating to insurance coverage, the Arizona Supreme Court follows the law in California. See *e.g., Jenkins v. Mayflower Insurance Exchange, supra,* wherein the Court held that the omnibus clause in the Arizona Safety Responsibility Act is a part of every insurance liability policy in Arizona; and, in so holding, followed the California decision in *Wildman v. Government Employees' Insurance Co.,* 48 Cal.2d 31, 307 P.2d 359 (1957). Likewise, in *Sandoval, supra,* the Court said that:

> This court has been previously inclined to follow California in its judicial interpretation of the Financial Responsibility Act. (428 P.2d at 103)

But even in California, an insurer is entitled to a judicial declaration that its policy of automobile liability insurance is void where the same has been procured by the false and fradulent representations of its insured. See *e.g., Allstate Insurance Company v. McCurry,* 224 Cal.App.2d 271, 36 Cal.Rptr. 731, 733 (1964), wherein the California Court held:

> The law seems clear that where the insured has secured a policy of automobile liability insurance through fraud, breach of warranty, or material misrepresentation, the insurer can rescind the policy as of its inception, notwithstanding the existence of any rights in third parties who were injured by the acts of the insured which occurred before the rescission.

See also *Allstate Insurance Company v. Golden,* 187 Cal.App.2d 506, 9 Cal.Rptr. 754 (1960).

It is, of course, possible to construe *Mayflower* and *Sandoval, supra,* and A.R.S. § 28-1170(F) to preclude an insurer from avoiding a voluntary automobile liability policy for fraudulent misrepresentations in its procurement. But if this had been the intention of the Arizona Supreme Court or the Arizona Leglislature, surely the Court or the Legislature would have so stated in clear and explicit terms. On the contrary, the Arizona Supreme Court has often stated that it will permit an insurer to avoid a life insurance policy when the same has been procured by false representations. *First Nat. Ben. Soc. v. Fiske,* 55 Ariz. 290, 101 P.2d 205 (1940); *Illinois Bankers' Life Ass'n v. Theodore,* 44 Ariz. 160, 34 P.2d 423 (1934); *American Nat. Ins. Co. v. Caldwell,* 70 Ariz. 78, 216 P.2d 413 (1950); *Modern Woodmen of America v. Stevens,* 70 Ariz. 232, 219 P.2d 322 (1950). And the Arizona Legislature has also plainly indicated that "an insurance policy" *of any type* may be avoided if it can be proven that the policy was procured by false representations as to facts material to the risk assumed. (A.R.S. § 28-1109) For this Court to hold otherwise, it must assume that the Arizona Supreme Court and the Arizona Legislature are now willing to countenance fraud. This cannot be the law.

In this regard, see *Virginia Farm Bureau Mutual Insurance Co. v. Saccio,* 204 Va. 769, 133 S.E.2d 268 (1963), wherein the Virginia Court permitted an insurer to avoid an assigned risk policy because the same had been obtained by fraudulent representations of the insured. In so holding, the Court stated:

> The right to rely on fraud as a defense should not be defeated in the absence of a clear showing that such was intended, either by legislative act or by the expressed intention or the course of conduct of the party entitled to so rely. (133 S.E.2d at 275)

The holding of this Court in the instant case will solicit and encourage operators of motor vehicles to obtain automobile liability insurance by fraudulent misrepresentations as this class will be placed in the envious position of having dollars to gain and absolutely nothing to lose. In addition, the decision, instead of encouraging drivers to drive more carefully, will more likely discourage drivers from obtaining automobile liability insurance, which will lead to more uninsured motorists on the roads if the insurance companies accept the advice of this Court and increase their rates to spread the costs over larger numbers of the motoring public. This may be the high water mark of civil judicial penalization of the general public who are safe drivers, and honest and truthful citizens, and protect that element of society who will procure insurance based upon false statements and deceit. It is strongly suggested that if the public policy against fraud and deceit is balanced against the possibility that an innocent third party may have to suffer because an applicant obtained insurance under untruthful circumstances, the latter must admit to the well-founded and engrained principle that the law encourages the public to be honest.

Thus, with some imagination, we can envision a situation whereby an applicant for insurance would misrepresent his driving record; obtain insurance from a company in Arizona; pay a much lower rate based upon his sworn statements in the application; be involved in an accident injuring a third party; have his insurance cancelled subsequent to the accident; go to a different insurance

company and obtain insurance based upon fraudulent statements, including the non-disclosure of the prior accident; be involved in another accident injuring a different party; have his automobile insurance cancelled by the new company, which procedure will go on *ad infinitum* simply because the law condones fraud and deceit in applying for automobile liability policies. The alternative suggested by this Court of solving this possible problem creates such an unreasonable and arbitrary burden upon the method of doing business as to substantially interfere with the liberty of contract and there is no reasonable relationship to the end sought to be accomplished by the judicial interpretation of the legislative act in this State. As previously mentioned, in the alternative, the companies will merely increase the rates for all members of the driving public, which in turn will prevent a certain percentage of lower economic groups from obtaining insurance which will increase the number of uninsured motorists driving on the highways of the State of Arizona, completely nullifying the Legislative policy sought to be accomplished by the Arizona Financial Responsibility Act. Nor should the Court be led to believe that the general public will not take advantage of the situation since shortly after the decision was rendered in this matter, the entire history of this case, including the facts of fraud and misrepresentation by Mrs. Gutierrez, was published by one of the Phoenix newspapers, on the front page, for all potential defrauders and deceiters to become aware of and follow.

2. The Opinion Should Be Modified to Exclude or to Explain Certain Language Contained Therein.

Appellant takes issue with this Court's statement found on p. 4 of the Opinion that: "It could keep her on the road, in a jurisdiction which required a driver to be insured." At no time, to the undersigned's knowledge, has Arizona ever required a driver of a motor vehicle to be insured prior to operating a motor vehicle on the highways of this State. Arizona falls within the classification of what has come to be known as the "one-bite" jurisdictions whereby financial responsibility does not have to be shown until after an individual has been involved in an accident. This Court and the Arizona Supreme Court have held on numerous occasions

that Arizona does not require a driver to be insured prior to an accident. Thus, the Court's argument based upon this statement above referred to falls of its own weight when the Court argues that Allstate armed Mrs. Gutierrez with a dangerous instrumentality which she could not have otherwise possessed. Mrs. Gutierrez was not required to have any insurance in the State of Arizona prior to this accident, as Arizona is not a compulsory insurance state, and thus, there is no way that even if Allstate had refused to sell Mrs. Gutierrez an insurance policy it could have kept her off of the roads.

3. Conclusion

This case illustrates how the Financial Responsibility Act of Arizona, as interpreted by the Arizona Supreme Court, is under the facts of this case so irrational and arbitrarily directed against Appellant as to deprive it of its constitutional rights. While all defenses to an insurance contract disappear upon the occurrence of an accident because of a provision of A.R.S. § 28-1170, the maximum liability of an insurance company is not limited to the amounts set forth in the same Statute or required by law as held by this Court in *Weekes v. Atlantic National Ins. Co.,* 370 F.2d 264. See also *Sandoval v. Chenoweth, supra.* There can be no constitutional basis in applying one portion of a Statute to a citizen and not applying another section of the same statute to the same person.

Based upon the foregoing, it is respectfully submitted that the decision heretofore rendered by this Court in this case should be reconsidered, and that the Court should enter its judgment reversing the U. S. District Court for the District of Arizona, or in the alternative, the Opinion should be re-written in the specific portion which is misleading and erroneous as heretofore mentioned.

Respectfully submitted,

O'Connor, Cavanagh, Anderson
Westover, Killingsworth
& Beshears

By John H. Westover
David L. Haga
Attorneys for Appellant